IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

LIBERTY MUTUAL INSURANCE CO. (as subrogee of CONNECTICUT TERMINAL CO.),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AS AMICUS CURIAE

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Statement of Interest of the Amicus Curiae

The Association of Trial Lawyers of America is the successor to the American Trial Lawyers Association, a national bar association, consisting of more than 25,000 lawyers, primarily engaged in the practice of personal injury law and compensation law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in an especially hazardous industry, recognized as having a special status both by legislation and generally in the courts of the land. All of the maritime workers, not members of the crew of vessels, have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case since the decision will determine in large measure whether injured maritime workers will have the opportunity to employ experienced trial counsel to represent them, which can only be done by assuring a reasonable fee. This case will also decide whether an injured employee will in effect have to contribute to the portion of any third-party recovery turned over to the employer-compensation carrier for its lien, in the form of legal fees. Put in another way, is it equitable for a compensation carrier or employer to recover its entire lien without contributing to the costs, expenses and fees required to recover the lien from a negligent third party? At issue is whether the welfare of the injured employee or the protection of the compensation carrier is the factor most to be considered in enactment of the Longshoremen's and Harbor Workers Compensation Act.

A resolution of the issues in this case will materially affect not only the financial recovery of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar representing

them, and to the maritime industry generally. By its decision, this Court will decide whether injured maritime workers will be able to procure proper legal representation to assure their rights and their economic future and well-being, and secure a fair share of a recovery. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief Amicus Curiae.

Consent to file this brief has been sought from the parties herein, and the consent of petitioner and respondent has been received, as well as the consent of Amicus Curiae representing West Coast Stevedores.

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Argument

The overwhelming weight of the authority among the states, and including the Federal Employees' Compensation Act is to have the employer or carrier (as subrogee) share in the attorney's fee in a third party action. No industrialized state allows an employer or carrier to recover its entire lien. This of course, leaves more for the employee who is the first beneficiary of the Longshoremen's Act.

An equitable doctrine prevails, nurtured by the United States Supreme Court that where an attorney recovers a fund not only for his client, but for others, the latter should share in the attorneys' fees. This doctrine has been the foundation for the various Courts of Appeal that have

required an employer-carrier to share equitably in a fee to the attorney hired by the employee in a third-party action.

The statute does not specify that the employer recovers its whole lien in a suit brought by the employee, nor does it specify who shares in payment of the fee of the successful attorney, but the statute is to be read liberally to protect the employee's interests above any other parties or the employer.

Prior to the 1972 amendments the lawyer recovered his fee from the employee's recovery. Congress did not legislate to curtail the attorney's fee nor to curtail the employee's recovery and make it subordinate to the recovery of the employer's full lien. Congress did legislate to promote the employee's interests in requiring the employer to pay a lawyer's fee in the compensation proceedings where there was a contested issue won by the employee. Congressional policy is to encourage the employee's lawyer to effectively represent him.

1. The Overwhelming Weight of Authority Is to Pay the Attorney for His Efforts in Recovering a Compensation Lien in a Third Party Action.

In 1970 New York was contemplating a statutory change to allow a lawyer to obtain a fee out of the portion of a third party recovery which was to be repaid to a compensations carrier for its lien. Subsequently, the statutory change was enacted.

An article on the subject was published by James B. Attleson, "Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees", 19 Buffalo L. Rev. 515 (1970). This article arose from a study made at the time by the New York State Law Revision Commission.

In the article a survey was made as to the background into versions of the various states' approach to workmen's compensation, its funding, the reservation of rights to a third party lawsuit, and the rights of the compensation carrier to recoup all or part of its compensation payments out of third party actions.

At the time some but not all the laws of various states were analyzed as to allowing the employee's attorney a fee for recovering moneys for the compensation carrier. He found that " . . . nearly all of the heavily industrialized states already provide some form of apportionment or statutory guarantee [to the employee]". (p. 543).

Although the discussion as to New York law is no longer relevant, as of 1970 the following highlights were observed:

> California, Michigan and Kansas allowed apportionment of fees on behalf of an employee's attorney, leaving the apportionment to the trial court without a specific statutory formula. (p. 532).
>
> Minnesota required the employer to bear a "proportion of the reasonable attorney's fees and costs" in collecting in a third party action. (pp. 532, 533).
>
> Pennsylvania and Maryland required payment of a pro-rated fee as well. (p. 533).

In fact, a fee was to be paid under the Pennsylvania laws of the *estimated future compensation* payments which were saved by reason of the third party recovery. (p. 533) (as noted *infra*, various other states adhere to this rule).

> In Indiana, New Jersey and Illinois, the employer-carrier pays stipulated attorneys' fees from the amount of liens recovered. The fees discussed varied from 25% to 33⅓%, in Indiana the difference being whether there is a settlement or a recovery after trial. (p. 534). In Massachusetts there was no provision for apportionment except as the employee and insurer might agree. But the employee would not be required to pay a more than proportionate fee. (p. 535, footnote 109).

Mr. Attleson discusses the basic economic premises of the compensation acts and the reservation of a right to pursue a damage claim against third parties. Compensation acts provide a minimum for the injured worker or his family; it is left to the third party action to recover full damages, including pain and suffering, not limited to schedules of percentage loss of earning capacity, or a limited statutory loss of earnings. (see pps. 516-520).

The author concludes in the following fashion:

> ". . . [Compensation] benefits represent only a fraction of the actual loss of earning capacity, but they are hardly adequate under any standard". (p. 519).
>
> * * *
>
> ". . . to deny the [third party] remedy may go further and increase the burden upon the public as a whole where the compensation benefits are in fact inadequate. . . ." (p. 520).
>
> * * *
>
> "More important for purposes of this study, the above catalog of benefits demonstrates that the cost of industrial injuries is *shared* by the employee and industry. *The employee absorbs a substantial portion of his loss.*" (p. 520). (emphasis supplied)
>
> * * *
>
> "Although benefits may be justifiably restricted, it is important to note again, that these limitations argue *for* third party actions, and, indeed, *encourage workers to pursue their common law remedy*" (p. 520). (emphasis supplied)

With this background in mind, the author discusses the social policy behind reimbursing the employee's attorney when he aids the employer or carrier to recover its lien.

> "Since the burden of industrial accidents is shared between employee and employer the question then becomes: *should* attorney's fees be allocated . . .?"
> "Sharing of fees is not inconsistent with compensation principles. Indeed, it would be consistent with the traditional principle of compensating injured employees. As referred to above, this principle, along with the acknowledged inadequacy of compensation benefits has justified the retention of third-party actions in the first place." (p. 541).

Does the carrier lose a substantial right when it reimburses the plaintiff-employee's attorney? The author thinks not. The only means of reducing a carrier's exposure is by recovery in the third party action.

> "A compensation carrier has no inherent right of subrogation, and in two states, carriers have no such rights." The carrier's recovery is a "windfall". "That is, this amount adds to the accident fund but is not based on any concurrent liability. The 'loss' suffered in the apportionment of attorney's fees can be considered as balancing this windfall." The author finds it inequitable that if the employer brings the third party action, it is reimbursed for its legal fees and expenses besides its lien. It is inequitable to make the employee bear the entire cost of attorney's fees when he sues. (pp. 542, 543).
>
> "Initially, as pointed out before, nearly all of the heavily industrialized states already provide for some form of apportionment or statutory guarantee." (p. 543).

It would be inequitable, he concludes, if the employee was "left with nothing after the attorney's fees and lien are subtracted . . . If this is the case, then the insurance carrier has received a windfall in that he has received funds, albeit a recoupment of prior expenses, without having to incur the normal expenses. In other words, the claimant has paid in order to reimburse the insurance firm." (p. 544).

Much of the latter discussions concerned a proposal to allow a carrier only to recover two-thirds of its lien. The author's conclusion is that this is an arbitrary way to allocate the cost of legal fees. "A better approach would be to leave it to the court to decide an appropriate distribution" (p. 544, footnote 135). He feels that judicial flexibility would be best in apportioning legal fees, since each case has its own variables.

The most recent annotation concerning the payment of a legal fee by the employer-compensation carrier is at 74 A.L.R. 3d. pages 854-953. It deals with the picture throughout the country, and is written by Thomas J. Goger.

Many states have an express provision for payment by the employer to a successful plaintiff-employee's lawyer;

> Florida, Illinois, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York (since 1975), North Carolina, Pennsylvania, Utah, Virginia and Wyoming.
>
> Illinois' highest court justified that statute in order to prevent "unjust enrichment" to the employer in recovering its lien. Plaintiff's attorney recovered a single fee based on a single recovery. Their decisions are based on a "common fund" theory. *Reno* v. *Maryland Casualty Co.,* 27 Ill. 2d 245, 188 N.E. 2d 657 (1963).

The federal government in the Federal Employees' Compensation Act, 5 U.S.C., Sec. 8132 requires a refund to the

government of the amount of compensation paid, but *after* deducting the cost of suit and a reasonable attorney's fee.

In fact, some states allow an attorney's fee based on the total exposure of the employer-carrier, that is, not only compensation actually paid, but what the employer-carrier saves from future actuarial compensation liability.

Indiana, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Utah and Virginia.

As noted, some states require a contribution by the employer computed as a percentage of the employer's recovery which performs somewhat the same function as a contribution towards an attorney's fees. Wyoming is listed among these.

Other states allow recovery of the fee by the employee's attorney without specific statutory language:

Kentucky (overruling prior authority), Louisiana (overruling prior precedent), and Oklahoma. New Mexico had a recent case requiring proportionate sharing. *Transport Indem. Co.* v. *Garcia,* 89 N.M. 342, 553 P. 2d 473.

California requires apportionment on the theory that the plaintiff's attorney creates a fund for which the passive beneficiary, the employer should pay. *Quinn* v. *State,* 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P. 2d 761 (1975) (disapproving other California lower court decisions).

Some states allow the employee's lawyer a fee and expenses as a first lien, but do not require an employer contribution.

Arizona, Arkansas, Mississippi, Tennessee, Wisconsin. Alaska recently overruled prior precedent and now requires the employer to pay a fee. *Cooper* v. *Argonaut Co.,* 556 P. 2d 525.

Montana was placed in an equivocal position.

But even in the above situation, if there is a deficiency, the employer ends up contributing to the first call of the plaintiff's attorney.

In some states there are cases where pro-ration of fees is allowed, where the employer also has a lawyer who contributes to the settlement or judgment, so that the employee's lawyer obtains a fee only for the percentage of the recovery attributable to his efforts. In the usual case under the present Longshoremen's Compensation Act, the employer cannot be impleaded and will not have its lawyer involved in the suit. In one unusual case where the employer was sued by a shipowner for property damage (although it could not be impleaded in a wrongful death action) and the case was consolidated with a death action, the Judge felt that an evidentiary hearing might be needed to decide how the fees would be apportioned.

Boncich v. *M. P. Howlett, Inc., et al.,* Docket No. 74 Civ. 1837 (E.D.N.Y. Feb. 13, 1978, J. Pratt, unreported and issue later settled between plaintiff's attorney and employer-carrier's attorney).

Some states do not charge the employer-carrier with the fee:

Alabama, Georgia, Iowa, and Washington.

Texas changed the law by statute in 1973 so that if the employer does not have an active attorney in the litigation, the fee is paid to plaintiff's attorney out of the employer's share as well.

It is thus apparent that *no* major industrialized state allows the employer to recover its whole lien without contributing to the plaintiff's lawyer, unless in some instances where the employer's own attorney contributed to the fund by his separate efforts. This confirms the observation made in the Buffalo Law Review article.

The weight of authority among the states, therefore, confirms a statement made in 7 Am.Jur.2d, Attorneys at Law, Sec. 204:

> "Unless the circumstances show that services were intended to be gratuitous, a party's acceptance of, or acquiescence in, the services rendered by an attorney will raise an implied promise to pay for the services." Citing *Bogorad* v. *Schwartz,* 208 F.2d 704 (4th Cir. 1953), and others.

The federal statute is modelled after the Workmen's Compensation Act of New York. New York precedents are given weight, but they are not necessarily followed.

In *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), a case dealing with the effect of an award on assignment of third party rights, the New York precedent was not followed. This Court made its own judgment of the to the employee in protecting his third party rights than issues involved, coming out with a decision more favorable New York decisions.

The only definitive opinion from the New York Court of Appeals discussing the relationship between the employee, his attorney and the carrier concerning the lien is *Curtin* v. *City of New York,* 287 N.Y. 338, 39 N.E.2d 903 (1942). This decision is solicitous of protecting the financial well-being of the employee. Under the language of the statute as it existed at that time, the Court quoted the language and held that the lienor recovers its lien:

> " '. . . after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery.' Subd. 1.".

This is the statutory language applied to the case which involved a deficiency situation where the recovery was

less than the compensation liability. The Court went on to state:

> "In that provision the Legislature has, in plain words, given recognition to the principle that *where one person without fault incurs expenses in creating a fund which inures to the benefit of another, he should be reimbursed* from that fund for the expenses so incurred. (emphasis supplied) In the application of that principle, there is no ground for distinction between a case where recovery has been had by a claimant after he has made claim for statutory compensation and a case where the proceeds of a recovery have been collected before the claim is made. The provision of the section that a person or corporation liable for payment of compensation shall have a lien upon the proceeds of a recovery and the provision of the same section that such a person or corporation must contribute only the deficiency, if any, between the amount of the recovery 'actually collected' and the compensation provided, are intended to carry out the same purpose in differing circumstances. They must be read together and each must be given the construction which will effectuate the legislative intent. So read, there can be no reasonable doubt that the words 'amount of the recovery * * * actually collected' are intended to mean 'actually collected' after the claimant has paid the expenses reasonably and necessarily incurred in obtaining any recovery. No artificial rule or canon of construction requires the court to disregard an intent so clearly indicated."

The only other New York Court of Appeals case relevant to the issue here (prior to the change in the statute) was a per curiam opinion affirming a lower court case which said the legislature should decide the issue of pro-ration of fees.

Kussack v. *Ring Construction Corp.*, 4 N.Y.2d 1011, 177 N.Y.S.2d 522, 152 N.E.2d 540 (1958), aff'g. 1 A.D.2d 634, 153 N.Y.S.2d 646.

A recommendation for a change in New York law was made by the Law Revision Commission in 1974, McKinney's Session Laws of N.Y., 1974, Vol. 2, p. 1906. By ch. 190, Laws of 1975, effective June 10, 1975, the New York statute was amended to require payment by the employer of the legal fees for recovery in third party actions. Vol. 198, McKinney's Session Laws, p. 293.

There can be no question that at the present time the overwhelming number of states allow the plaintiff's attorney a fee from the moneys received by the compensation carrier in payment of its lien. This is justified by the need to encourage suit in a proper case to recover full damages for an employee, which benefits both the employee and the compensation carrier. For the efforts of the plaintiff's attorney, the compensation carrier should pay its proportionate share of the expenses of recovery.

No major industrial state allows the carrier to recover its whole compensation expense without sharing the cost.

2. Where an Attorney's Efforts Bring About a Fund, Equity Traditionally Has Awarded a Fee.

A philosophical basis has existed in our law through many generations which justifies paying the lawyer a fee where he benefits someone besides his actual client through the efforts successfully made on his client's behalf.

Historically, courts have an equitable power to approve fees to an attorney who recovers or preserves a fund which benefits others besides his initial client. Although the Supreme Court recently denied a fee to be paid by the *losing party* in a case involving conservation law, the Court recognized the continued viability of the "common fund doctrine" in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

In fact, after the *Alyeska* decision, *supra*, Congress amended the statute, 42 U.S.C., Sec. 1988 to provide that in certain civil rights cases, the prevailing party could be awarded a reasonable attorney's fee, in the court's discretion.

Isaacs v. *Temple University*, 467 F. Supp. 67 (E.D. Pa. 1979) at pages 68 and 69.

In those cases as in the Longshoremen's Act amendments Congress wished to encourage citizens to seek their proper legal redress. As Judge van Artsdalen stated in the *Isaacs* case, *supra*, "The doors to federal courthouses must remain open to all who have justiciable federal causes of action". (p. 70).

The doctrine has been reviewed in at least two annotations, John P. Dawson in 87 Har. L. Rev. 8, p. 1597 (June, 1974) and by Jean F. Rydstrom, 42 A.L.R.Fed. 134.

Mr. Dawson indicates interestingly enough that the United States Supreme Court was the creator "almost single-handedly" of the "'common fund' as a source of counsel fees". (p. 1601).

The first landmark case was *Trustees* v. *Greenough*, 105 U.S. 527 (1881). Mr. Dawson sets out the facts as follows (p. 1601):

> "The State of Florida had conveyed to trustees more than ten million acres of state-owned land to provide security for a bond issue of the Florida Railroad Co. The trustees had collusively sold hundreds of thousands of acres at nominal prices and had failed to provide reserves for payment of interest and principal on the bonds. Vose, a large holder of the Railroad Company's bonds, sued to set aside the transfer as fraudulent and for the appointment of a receiver. After eleven years

of litigation at his own expense he had recaptured the looted assets and secured large payments to the bondholders, which they had accepted.

Vose, the client, then presented a claim for reimbursement of his lawyers' fees. The residue of the restored trust estate was still being administered by a receiver under the trial court's direction in the interest of the bondholders, so there was a fund under the court's 'control' that could be tapped. As the Supreme Court pointed out, if the trustees themselves had rightfully incurred these expenses in retrieving the assets for the trust, the expenses would have been chargeable to the trust estate, which by familiar rules must 'bear the expenses of its own administration'; Vose merely performed the trustees' duty. The Court concluded that to deny Vose contribution to the costs he had incurred

'would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; . . . [t]hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution' ".

The second landmark case is *Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 16 (1885). The claim was a direct claim for attorney's fees for a prior successful action benefitting a class of creditors of a railroad. The Court held that a fee should be paid by those who "accept the fruits" of the labors of others. A lien was given the lawyers to secure their fees, in addition to the fee received from the client.

A later case, often cited, is *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939). Sprague was a suitor seeking

the allocation among beneficiaries of certain bonds in a trust which secured money in a bank's trust account; the bonds had been sold by a receiver. Having established her right to certain of the bonds and impressing a trust, she established the rights of other beneficiaries, and she thereafter sought an allowance for her attorney's fees.

Justice Frankfurter delivered the opinion, and spoke at length of the historic powers of equity courts to award counsel fees under these circumstances. He noted that it was not a class action as such.

"Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." (p. 167)

Vaughan v. *Atkinson,* 369 U.S. 527 (1962) cites *Sprague* with this observation:

". . . allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of Federal Courts'" (p. 530).

The *Vaughan* case held that a shipowner's willful failure to pay an employee maintenance rightfully due could lead to liability for damages and a legal fee.

In footnote 25 of his article, Mr. Dawson enumerates 28 decisions where the fund analogy was used successfully.

See also, *Nolte* v. *Hudson Navigation Co.,* 47 F.2d 166 (2nd Cir. 1931) (attorneys to be given added fees when they increased a fund for unsecured creditors; even though others had their own attorneys, this might not prevent contribution to the successful, active attorneys).

Doherty v. *Bress,* 104 App. D. C. 308, 262 F.2d 20 (D.C. Cir. 1958), cert. den., 359 U.S 934 (1959) was a multiple disaster case. One attorney was designated to bring a test case to trial. He recovered an extra fee from a subrogee insurance company which benefited from his efforts, although the lawyer was never hired as such and in fact the insurance company refused to consent to his acting as chief counsel.

Mr. Dawson's article also discusses the situation which may arise where lawyers for different parties contribute to the fund, possibly equally, possibly unequally. The court would have inherent discretion to adjust the fees (pp. 1648, 1649) based on effort. In fact, as noted below, there are cases, like multiple disaster cases where the attorney who does the lion's share of the work may be awarded something from the fees of inactive or less active lawyers who have benefited from the effort.

Mr. Dawson is not in favor of the award of fees to a successful party, but he acknowledges that the cases do favor the financial encouragement of a lawyer to exert his energies for the benefit of his clients and others in the same position as his clients.

In other more recent cases, involving multiple disaster suits against air lines, the common fund doctrine has been applied to give a fee to the lawyers who were designated to bring the actions to a successful conclusion. Their activities benefited other parties, and as lead counsel, they did the work that the bystanding attorneys did not. In one case, the lower court proceeded on concepts of quasi-contract and restitution. On appeal, the court found that

there was a fund, court control, and that the fees should be paid to the lead counsel even though each plaintiff had his own attorney. Lead counsel had had the laboring oar from which all benefited. *Vincent* v. *Hughes Air West, Inc.,* 557 F. 2d 759 (9th Cir. 1977). Accord. *In Re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006 (5th Cir. 1977). In the latter case, the court found that the court-appointed committee of lawyers bore responsibilities beyond their own individual cases, and their activities served the interests of the court, the litigants and other counsel as well as the need to push the cases to a conclusion in a reasonable time. The Court also had support in the Manual for Complex Litigation, widely used in multiple claim cases.

Because of the long history of this "common fund" doctrine, it has been widely used in the analysis favoring the employee in the situation at bar. *Swift* v. *Bolten,* 517 F.2d 368, 370 (4th Cir. 1975) which supports the Petitioner's position, refers to *Vaughan* v. *Atkinson, supra* and *Sheris* v. *Travelers Ins. Co.,* 491 F.2d 603 (4th Cir. 1974) cert. den., 419 U.S. 831.

The fund argument was also referred to in the Second Circuit case preceding the case at bar, *Valentino* v. *Rickners Rhederei G.M.B.H., S.S. Etha,* 552 F. 2d 466 (1977). There, referring to the *Sprague* Case, supra, Judge Meskill stated, "charging the fund with the expense of recovering it is in keeping with the statutory scheme". (p. 470).

The *Valentino* court also said (p. 468):

> "It is a well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts".

Petitioner respectfully suggests that the view expressed in 1977 by the Second Circuit should have been followed in 1978 in the decision below, and should be again reaffirmed

in this Court in recognizing the equitable argument in Petitioner's favor.

3. The Longshoremen's Act Amendment Encourages Proper Legal Representation for the Claimant by Allowing Legal Fees in Contested Matters.

Under the prior Longshoremen's and Harbor Workers' Compensation Act, the longshoreman paid his attorney an approved fee out of his compensation recovery, and those fees were usually penurious, to say the least. *DiCostanzo* v. *Willard*, 165 F.Supp. 535 (E.D.N.Y. 1958) (a case where a fee of $175.00 was increased substantially but was still negligible compared to the benefits recovered and time expended by counsel, whom the court described as an able and experienced longshoremen's compensation practitioner).

The 1972 Amendments to the Compensation Act, 33 U.S.C., brought into the law a minority concept of the "add-on" attorneys fees in contested workmen's compensation cases in which the insurance carrier is ordered to pay claimant's lawyers his fees and expenses for securing benefits for the employee which were refused by the carrier. 33 U.S.C.A. 928 (a) (b). Not many jurisdictions make this provision in the law, Florida being one of the few states that does. See, Larson, Workmen's Compensation, Section 83.13.

It is therefore quite apparent that the prior provision of paying the fee out of the injured man's or widow's award made it impracticable for an attorney, particularly one of experience and competence, to handle contested cases since the deputy commissioners approve only the most minimal fees.

Preparation had to be scanty due to economic considerations and medical reports substituted for testimony.

Rarely would the claimant have his own doctor; and those who did, usually did not have live testimony, only reports. This was the situation where the claimant had no third-party action.

To correct that gross inequity, which for all practicality deprived claimants of counsel in adversary proceedings against well-paid insurance representatives, the LHWCA was amended. Another reason for the amendment was the attempt by Congress to limit third-party actions by longshoremen by denying unseaworthiness recoveries. Those actions formerly provided their attorneys with a means of being compensated for services, so that the claimants' attorney usually handled the compensation proceedings as part of his overall representation of the injured man, looking to the third-party phase of the total litigation for his ultimate fee.

As part and parcel of their overall representation of their clients most claimants' lawyers were therefore well-prepared for the compensation proceedings with competent medical testimony and witnesses if the accident were contested. But in the third party proceedings the fee awarded had to cover not only the attorney's services, but also the expenses of bringing in the doctors and witnesses and the costs of transcripts and depositions.

The 1972 amendments were designed to correct this disparity between the advocacy of counsel representing the insurance carriers in the adversary proceedings and those the claimant could afford. Since the claimant seeks benefits for loss of work, it is self-evident he can't pay a lawyer or expenses out of his pocket; if he could afford it, payments must still be approved under penalty of law. Section 928(g). It is therefore apparent the lawyer must depend on successfully handling the claim to be paid a fee and *recover* expenses. Also, since some claims will be unsuccessfully concluded, as they must in any adversary system, the attorney should be paid adequately in successful

cases to compensate for accepting a class of litigation which does not assure payment, and where a fee is contingent.

Section 928 (a) provides for the payment of attorneys fees and expenses by the carrier if benefits are not paid within 30 days after notice of claim, or after 14 days after recommendation of payment by the deputy commissioner. If an offer of payment is made and rejected by the claimant, Section 928 (b) provides:

> "If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation."

Fees are approved by the tribunal involved and are also awarded on successful appeals before the Benefits Review Board and the Courts of Appeals. Section 928 (b) (c). The Fifth Circuit has approved a fee of $1,000 for a brief and appearance before the Benefits Review Board ("BRB") and directed an additional fee for brief and argument in that court on appeal. *Ayers Steamship Co.* v. *Bryant,* 544 F.2d. 812, 5BRBS 317 (5th Cir. 1977); see, *Atlantic & Gulf Stevedores* v. *Aleksiejczyk,* 542 F.2d 602 (3d Cir. 1976). The constitutionality of the procedures for setting fees has also been upheld. *Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d 533 (5th Cir. 1976).

The basis for the award of fees to successful claimants is contained in the committee reports and legislative history of P. L. 92-576, U. S. Cong. & Adm. News, 1972, pages 4706, 4717.

As one of the very few statutes allowing fees to be paid at the carrier's expense where there is a dispute, it is

obvious that the statute is meant to encourage good lawyers to spend the necessary time, effort and skill to properly protect a claimant's right.

This same philosophy of encouraging proper representation for claimants should spill over in terms of a lawyer receiving an inducement to take the third party actions. At the present time the possibility of recovery in third party actions is more restricted than prior to the amendment. There is no longer an unseaworthiness claim or exposure by the employer which previously aided settlement. The liens are larger including the much higher hospital and medical expenses of recent years, and a net settlement after repayment of the lien would be less today than before the amendments so far as the employee is concerned.

Unless a lawyer receives a fee out of the compensation lien recovery, the routine or small third party action may not be prosecuted to its fullest possible extent. The realities are that the maritime worker unless he has a devastating injury and a clean-cut negligence claim may have a hard time in obtaining properly trained attorneys. If the lien is so large and the sums allocated to the employee are relatively small, a lawyer would not in good conscience claim all the fee he is entitled to. On the other hand, if the employee waives his right to sue, there are practical impediments to an action by the employer-stevedore or other maritime employers in their relationships with their customers which make it unusual for the stevedore-employer to sue the shipowner. See *Brown* v. *American Mail Line, Ltd.,* 437 F. Supp. 628 (D.C. Ore. 1977). There the court held that the longshoreman's attorneys were entitled to a reasonable fee out of the carrier's lien; and *Valentino* v. *Rickners Rhederei, G.M.B.H. S.S. Etha,* 552 F.2d 466 (2nd Cir. 1977). The Brown case, in footnote 2 refers to *Valentino,* which observed at 552 F. 2d 469 "that during oral argument, 'both parties stated that stevedores do not, as a practical matter, pursue these

lawsuits—presumably for fear of antagonizing their customers' ".

In this legislation, it is the employee who is the primary concern of Congress. His rights to seek out competent counsel were meant to be strengthened and encouraged.

And in fact it is only in a third party damage recovery that the employee *and* employer can recover their losses, and spread the costs of the injury. See *Brown* v. *American Mail Line, Ltd., supra.*

So, with effective representation the employee and employer are on the same side where the 1972 amendments meant them to be. They have a common interest against a third party.

4. The Statute Does Not Specify What Is to Be Done in This Case, But the Implications Are Clear.

The statute is not specific in providing an attorney's fee on the whole recovery where the employee sues a third party. The Act only has provision for the situation where the *employer* prosecutes the third-party suit. Sec. 933(e). But there, the *employee* shares in the legal costs since only a net figure can benefit him. Equity would mandate then that the *employer* also share in the costs of producing the fund when the suit is brought by the employee.

Such a discrepancy in the Act has been explained by the history of the Act since 1927. As originally drawn, the Act contemplated that the employer would ordinarily bring the third party suit. It was not until a 1959 amendment that the employee was allowed to take a compensation award and retain for six months the right to sue the third party.

Edmonds v. *Compagnie Generale Transatlantique,* decided by the Supreme Court June 27, 1979 at page 13 made note of the history of the Act. When the longshore-

man sues, the employer has a lien which is "judicially created" since it is not statutory. In 1972 Congress left intact the rights of the employer where it brings suit including the costs of suit, but did not deal with the mechanics of suit brought by the employee, except to limit him to a negligence claim.

What is the philosophy behind the 1972 amendment? It is obviously to maximize the employee's recovery when injured in a trade where wages are high, but where the risk of injury is among the highest. And this at the least cost.

But the intent was *not to benefit* the compensation carrier at the employee's expense, which is a repugnant philosophy verbalized in *Cella* v. *Partenreederei M. S. Ravenna,* 529 F.2d 15 (1st Cir. 1975) cert. den., 425 U. S. 975 (1976).

In *Director, Office of Workers' Compensation Programs, et al.* v. *Rasmussen,* —— U. S. ——, 59 L.Ed. 2d 122 (1979), the Supreme Court only last February of 1979 dealt with the arguments made to conserve the compensation carrier's assets at the expense of a deceased employee's family. This the Court rejected. The language of the LSHWA statute and its legislative history were read to be protective of the employee, not the insurers even though the result was an open-ended exposure for death benefits.

In *Edmonds* v. *Compagnie Generale Transatlantique,* —— U. S. ——, decided June 27, 1979, the Court had before it the issue of whether an injured longshoreman should recover his total damages against a shipowner even where his employer or co-employee was also negligent. It was held that the employee does recover his total damages, less his contributory negligence, because the shipowner is a joint tort-feasor. Although negligent, the stevedore-carrier recovers the compensation paid from out of the plaintiff's damages. The lien is repaid by statute where the employer sues, and by court decision where the employee sues.

At page 12 of the decision, Justice White stated:

> "Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act."

At page 13 of the decision, the Court held:

> "Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect."

At page 14 the Court held that it will not restrict the employee's rights because the Act is "a remedial act", citing *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278, 279 (1977).

According to other cases as well, the Act is to be "liberally construed in favor of the workman", *Strachan Shipping Co.* v. *Melvin,* 327 F.2d 83, 86 (5th Cir. 1964). *Voris* v. *Eikel,* 346 U.S. 328 (1953). *Strachan, supra,* and the view expressed in *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274 (5th Cir. 1978), more clearly express the purposes of liberality favorable to the employee. Judge Rubin in the *Mitchell* case sought an equitable formula which would strike an appropriate balance between the twin goals of protecting the injured employee and conserving compensation funds. He reasoned that the best way to preserve the compensation carriers was to encourage proper representation and prosecution of the third party action. The court could make an equitable proration of the fee based on various factors including the reasonableness of the fee to be paid by the carrier. As noted, at the present posture of most third party actions it

would be unusual for the employer-carrier or its attorneys to be involved in the third party suit. See, *Edmonds, supra,* at page 14 of the opinion.

The Fifth Circuit relied on a theory of equitable reallocation closely following the opinion of the Fourth Circuit in *Swift* v. *Bolten,* 517 F.2d 368 (4th Cir. 1975). *Swift* notes that the employer is no longer made a party and has no obligation to indemnify under the 1972 amendments. When the employer receives a pecuniary benefit from the employee's successful negligence suit, "the stevedore [employer] should be taxed with that part of a reasonable fee for the longshoreman's counsel as is proportioned to its share of the recovery" (p. at p. 370). See also, *Liberty Mutual Ins. Co.* v. *Ameta & Co.,* 564 F.2d 1097 (4th Cir. 1977).

Since the statute is not explicit, this Court's dilemma has been properly answered in *Chouest* v. *A & P Boat Rentals, Inc.,* 472 F.2d 1026, 1036 (5th Cir. 1972) cert. den., 412 U.S. 949, where the third party recovery was insufficient.

> "Congress has not spelled out a formula for dividing the recovery in employee-initiated third party actions. Perhaps it did not do so because it could foresee the variables outlined in the preceding part of our opinion today, and concluded that detailed statutory treatment would be inappropriate. Until Congress does provide a specific formula, it is our responsibility to divide third party recoveries in the manner we feel best accords with the purpose of Congress in enacting the LHCA — to provide a swift and efficient compensation scheme for maritime workers *while preserving intact a viable right of damages against third parties for sums beyond those minimum sums authorized as compensation.*" (emphasis added).

5. This Court Should Follow Congressional Intent in Allowing an Attorney's Fee.

Edmonds v. *Compagnie Generale Transatlantique, supra,* decided by this Court on June 27, 1979 analyzed the Court's dilemma where the Act is not explicit, but where it was amended by Congress with the law in mind as it existed prior to the amendments in 1972.

Prior to the 1972 amendments, the employee could recover his complete damages from the shipowner or third party, whereby the attorneys received their fee on the recovery. At that time the employer was often impleaded, but in the last analysis, recovered its lien.

Nothing was done by Congress in 1972 to change the attorney's fee on the third party recovery.

As the *Edmonds* decision notes (p. 2):

> "Admiralty law is judge-made law to a great extent, *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 409 (1975); *Fitzgerald* v. *United States Lines Co.,* 374 U.S. 16, 20 (1963) . . .".

At pages 15 and 16 of the *Edmonds* opinion, this Court noted that:

> "In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances . . . Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them."

On the basis of the pre-1972 recoveries, and the relationship of the attorney and employee, now that *Edmonds* has confirmed a full damage recovery by the employee, the attorney should still be able to have a reasonable contingent fee. Nothing was done or even discussed by Congress in relation to fees except in the compensation proceeding itself.

The decision sought by Petitioner therefore accords with Congress' understanding of the situation, and the Court is empowered to make this relationship explicit.

Conclusion

The Longshoremen's Act by implication and by its requirement for a liberal interpretation in favor of a claimant-employee, read in conjunction with specific reference to attorneys' fees leads to the conclusion that in a successful third party action the employer-compensation carrier should make a reasonable fee available to the employee's attorney. Such a rule will encourage proper representation which protects the employee, but also will encourage recovery of the lien which overall will be for the benefit of the insurers. Equity has traditionally allowed a legal fee where an attorney's efforts create a fund which benefits others besides his own client. The weight of authority among the states overwhelmingly encourages this pro-ration of attorneys fees and the changes in the Act in 1972 make the employer and its carrier a passive party only, in the usual case, whose interests now coincide with the interests of the employee. See *Edmonds* v. *Compagnie Generale Transatlantique, supra,* page 14.

Decisions of the Fourth and Fifth Circuits and the Oregon District Court are more in line with the purposes of the Act than the decision below.

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